GETTING BACK TO BASICS WITH EMPLOYMENT CONTRACTS

As time passes in the world of employment relationships, many aspects of the law seem to change. Governments change statutes and courts re-write the common law on almost a daily basis. One thing which remains constant is the value of a written employment contract.

It is, as I have repeated many times, an employer's best (and, in some cases, only) opportunity to dictate its preferred employment terms. Employers simply should not be without binding, enforceable contracts of employment.

Employment contracts can contain many different versions of terms which are specific to a particular relationship. It definitely makes sense to tailor the employment contract rather than using a generic version. Employers should, however, give consideration to including at least some, if not all, of the following items.

Things To Include

The contract should, of course, identify the date of commencement of the employment (and, if the contract is intended to be for a limited term, the expiry date). It is *highly* preferable that the commencement date of the employment is after the date on which the employee signs the contract.

The employer's policy manual should be expressly incorporated into the contract. This gives the contents of the policy manual binding, contractual force. A copy of the policy manual should be provided to the employee along with the contract so that he or she has the opportunity to review it before signing.

If the employer seeks the benefit of an initial probation period, the elements of the probation should be set out. This is, in my view, one of the most useful clauses an employment contract can contain. The absence of a detailed probation clause will surely undermine an employer's attempt to dismiss a short-term employee without notice or pay in lieu.

In seasonal or cyclical businesses, the contract should provide the employer with the discretion to impose temporary, unpaid layoffs. This protects the employer against the assertion that an unpaid layoff amounts to a constructive dismissal (the right to impose an unpaid layoff is not an implied term of the relationship and must be agreed upon by the parties).

The employer should include a thorough confidentiality (or non-disclosure) clause to prevent unauthorized use and exploitation of the employer's information. Types of information typically protected will include customer lists, financial information, pricing and marketing strategies, trade secrets and intellectual property, etc.

Especially in businesses where the employee may be developing ideas for new designs or inventions, the contract should clarify the ownership of the work product. Many employers assume, *incorrectly*, that they automatically gain ownership of everything their employees create. Such a clause is intended to remove all doubt about the employer's ownership entitlement.

Restrictive Covenants

Enforceable non-competition and non-solicitation covenants are also recommended, at least when the employee poses a competitive threat. These clauses are, however, notoriously difficult to create in a manner which will be binding at a later date.

I advocate a "less is more" approach to such covenants (the less restrictive the covenant, the more likely it is to be upheld by a court). I also suggest to employers that they first answer, candidly, whether they even require such protection from a particular employee - the truth is that few employees really pose such a competitive threat that the employer really requires the protection of a post-employment covenant.

The Severance Formula – Notice, Pay, Benefits

A severance formula is required to oust the impact of the implied common law requirement of reasonable working notice of termination. This is, without a doubt, the single most important content in an employment contract.

This is one of the greatest advantages a non-union employer has over those with certified bargaining units – it has the discretion to terminate the employment of any employee on a "without cause" basis at any time and for any (non-discriminatory) reason. Put another way, the loss of that discretion is one of the biggest things employers lose when their employee contingent becomes unionized.

In the non-union context, the employer has the discretion to impose an advantageous severance formula in the employment agreement. But, it *must* be at least as generous as that required in the applicable (provincial or federal) employment standards legislation.

An item which is often missing from employment contracts is a clause clarifying what happens to employee benefits upon the cessation of the relationship. It is *essential* for the employer to ensure there is no lingering obligation to provide continued insurance coverage after the employment comes to an end.

Managers – Overtime Pay?

Finally, issues relating to entitlement to overtime pay can, and should, be addressed in the employment contract.

If the employee is not a manager, the contract should confirm that work attracting overtime pay rates must only be performed with the employer's prior authorization. If the employee is considered a manager, the contract should emphasize that the employee's salary is intended to cover all hours of work (such that extra pay, whether at straight-time or at overtime pay rates will not be paid).

An employment contract can, of course, contain many other types of clauses but these are, in my view, the most critical items. Employers who properly utilize written employment contracts addressing these topics will find they have an uncanny ability to avoid ever having to walk into a courtroom to argue the concept of "wrongful dismissal".

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